No. 01-342

Supreme Court, U.S.
FILED
SEP 26 2001
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In The
Supreme Court of the United States

LUIS REYES-GAONA,

Petitioner,

v.

NORTH CAROLINA GROWERS ASSOCIATION, INC.
and
DEL-AL ASSOCIATES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NORTH CAROLINA GROWERS ASSOCIATION, INC.

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QUESTION PRESENTED

Whether the Fourth Circuit erred in affirming the order of the trial court granting Respondents' Rule 12(b)(6) motion to dismiss where the Circuit Court found that, in the absence of a clear mandate from Congress, the protections of the Age Discrimination in Employment Act do not apply to every undocumented foreign national who, while residing in his or her native country, decides to apply for work within the United States even though that individual does not have authorization to work in the United States?

CORPORATE DISCLOSURE STATEMENT

Respondent North Carolina Growers Association (NCGA) has no parent corporation, nor does any publicly held company own ten percent or more of Respondent's stock.

STATEMENT OF THE CASE

1. Procedural History

Petitioner Luis Reyes-Gaona (Reyes-Gaona) instituted this action in the United States District Court for the Middle District of North Carolina, alleging that Respondents, NCGA and Del-Al Associates, Inc. (Del-Al), violated the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (ADEA). In response, both NCGA and Del-Al filed motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On June 22, 2000, Chief Judge Tilley entered an order granting Respondents' motions. Pet., p. A-16. On May 22, 2001, after oral argument at which all parties were present, the Fourth Circuit Court of Appeals affirmed. Pet., p. A-8. This petition followed.

2. Statement of Alleged Facts

By way of background, NCGA is a corporation that provides various services to its approximately 1000 members. Pet., p. A-2. Its members are owners and operators of agricultural businesses in North Carolina. Pet., p. A-2. Among the services NCGA provides to its members is assistance in securing foreign agricultural labor through the federal H-2A temporary agricultural program. Pet., p. A-2. Del-Al is a corporation that assists NCGA with recruiting such labor. Pet., p. A-2.

The H-2A program establishes a means for U.S. employers who anticipate a shortage of domestic agricultural labor to apply for permission to recruit and employ foreign workers to perform agricultural labor or services of a temporary or seasonal nature in the United States. *Immigration and Nationality Act*, as amended by the *Immigration Reform and Control Act of 1986*, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), 1184(c), 1188 (IRCA). Before the Immigration and Naturalization Service

(INS) will approve an employer's application for such workers, the employer must certify that there are sufficient domestic workers who are able, willing, qualified and available and that the employment of the foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. § 1188(a). The H-2A program is thus designed to balance two competing interests - - to assure employers an adequate labor force on one hand and to protect the jobs of U.S. citizens on the other.

In this case, Reyes-Gaona claims that he was denied employment by Respondents because of his age in violation of the ADEA. Pet., p. A-3. According to his Complaint, Reyes-Gaona is a 55 year old farmworker who is a Mexican national and resident of Michoacan, Mexico. Pet., p. A-12. Reyes-Gaona alleges that, in May 1998, he went to the Mexican offices of Cipriano Molina (an individual alleged to be employed by Del-Al to recruit migrant labor for NCGA and its members) and asked to be placed on the list of workers seeking employment in North Carolina under the federal H-2A program. Pet., p. A-12. Reyes-Gaona claims that, in response to this request, Molina told him that NCGA would not accept an application from a worker who is over 40 years old. Pet., p. A-12. Reyes-Gaona claims that Molina also told him that the only way a worker over age 40 could be hired is if the individual had worked for a NCGA member in the past and the member had requested that worker by name for future seasons. Pet., p. A-12. Finally, Reyes-Gaona alleges that he was, and remains, qualified to perform the labor for which Repondents were recruiting. Nowhere in his Complaint, however, did Reyes-Gaona allege that he was, or is, legally authorized to work in the United States. Pet., p. A-14.

ARGUMENT

I. THE FOURTH CIRCUIT PROPERLY AFFIRMED THE LOWER COURT'S DISMISSAL OF PETITIONER'S COMPLAINT BECAUSE THE ADEA DOES NOT APPLY EXTRATERRITORIALLY TO FOREIGN NATIONALS.

In his Petition, Petitioner contends that the Fourth Circuit's decision "creates a clear conflict among the circuit courts regarding the standard for determining when a claim requires an employment discrimination law to be applied extraterritorially." Pet., p. 4. There is no conflict as to what standard applies. In fact, since 1984, the standard has been crystal clear - - that is, that the ADEA does not apply extraterritorially to foreign nationals who apply from their native countries for work within the United States.

Prior to 1984, the ADEA did not contain language that extended to U.S. citizens employed by U.S. companies or their subsidiaries in foreign workplaces. Thus, before the 1984 amendment, the ADEA did not reach events taking place in foreign countries even when they involved citizens of the United States, much less, as Petitioner now alleges, "the even more attenuated situation of a foreign national applying in a foreign country for work" in America. Pet., p. A-5; *see also* Pet., p. 10.

In 1984, after several courts, including the Fourth Circuit, confirmed that the protections of the ADEA did not apply overseas, Congress amended the statute to provide that the term "employee" includes "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f).[1] The purpose of this change was to make the protections of the statute available to

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[1] In *Thomas v. Brown & Root*, the Fourth Circuit had held that an overseas firing of an American citizen was not covered by the ADEA. 745 F.2d 279, 280 n. 1 (4th Cir. 1984).

Americans employed in foreign countries by U.S. corporations or their subsidiaries. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 258, 111 S. Ct. 1227, 1236 (1991). It did not, however, extend those protections to foreign nationals not authorized to work within the United States.

As this Court has held, in the absence of a clear statement by Congress to the contrary, there exists a strong presumption against extraterritorial application of United States law. *See Arabian*, 499 U.S. at 253, 111 S. Ct. at 1233.[2] Obviously, Congress knew how to amend the ADEA when it wanted to make clear that it intended for the ADEA to cover U.S. citizens who are employed abroad by U.S. companies. *See* 29 U.S.C. §§ 630(f); 623(h)(1); *see also Arabian*, 499 U.S. at 253, 111 S. Ct. at 1233 ("'when it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute'") (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)). Presumably then, if Congress had wished to make it clear that the ADEA was intended to also apply to undocumented foreign nationals who apply for work within the United States while residing in their native countries, it would have again amended the ADEA. This Congress had not done.

In light of this, NCGA respectfully submits that where Congress has elected not to act, neither should this Court, especially where, as here, to do so would potentially extend the protections of the ADEA to millions outside of the United States who need do no more than submit a resume to a U.S. company over the Internet in order to invoke ADEA coverage and earn the right to file a charge of discrimination with the

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2 In *EEOC v. Arabian American Oil Company*, this Court held that Title VII does not apply extraterritorially to regulate the employment practices of U.S. employers who employ U.S. citizens abroad. In 1991, Title VII was amended to extend its protections to Americans working overseas for American employers. 42 U.S.C. § 2000e(f). While this amendment supersedes the Court's ruling regarding the coverage of Title VII, it did not render nugatory the Court's pronouncements concerning the principles of statutory interpretation.

already overworked Equal Employment Opportunity Commission. Accordingly, because under the plain language of the ADEA, the statute does not apply to individuals such as Reyes-Gaona, the Fourth Circuit correctly held that the judgment of the lower court granting Respondents' Rule 12(b)(6) motions to dismiss should be affirmed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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